FLORIDA SUPREME COURT

CASE NO. 68,899

NATIONAL CORPORACION VENEZOLANA, S.A.,

Plaintiff/Appellant,

versus

M/V MANAURE V, etc., et al.,

Defendants,

and

SEGUROS ORINOCO, C.A. AND THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA), LTD.,

Defendants/Appellees.

On Certified Question From the United States Court of Appeals For the Eleventh Circuit

CASE NO. 84-3780

BRIEF OF SEGUROS ORINOCO, C.A. AND THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA), LTD.

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CONVENTIONS USED

In this brief the following conventions will be used to denominate the parties:

Plaintiff/Appellant, NATIONAL CORPORACION VENEZOLANA, S.A., will be referred to as "NATIONAL CORPORACION."

Defendants/Appellees, SEGUROS ORINOCO, C.A. and the STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA), LTD. will be referred to individually as "SEGUROS ORINOCO" and "STEAMSHIP MUTUAL" and will be referred to collectively as "Underwriters."

All relevant documents from the record have been assembled in the appendix included in this brief. Reference to the appendix will be "App. _____."

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ISSUE ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Does Florida law recognize a right of direct action against a marine liability insurer in a cargo damage action accruing after October 1, 1982?

STATEMENT OF THE CASE

Pursuant to Florida Rule of Appellate Procedure 9.150, the United States Court of Appeals for the Eleventh Circuit certified a question of law to this Court, which has jurisdiction pursuant to Art. V, §3(b)(6), Fla. Const.

This is a maritime cargo damage case arising out of the carriage of electronic parts on board the M/V MANAURE V from Miami, Florida, to LaGuaira, Venezuela. The cargo was shipped on January 25, 1983 from Miami and delivered in LaGuaira on February 17, 1983. (App. 1) Suit was filed on October 7, 1983, by NATIONAL CORPORACION on behalf of all parties interested in the cargo in the United States District Court for the Middle District of Florida, Jacksonville Division, pursuant to that court's admiralty and maritime jurisdiction, 28 U.S.C. §1333. (App. 1) An Amended Complaint was filed with leave of the District Court on February 2, 1984. (App. 2, 3)

The Defendants named in the suit are the M/V MANAURE V, in rem [1]; LINEA MANAURE, C.A., as operator of the vessel

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[1] The vessel was not arrested by the United States Marshal and therefore never came under the jurisdiction of the United States District Court.

and carrier of the cargo; and SEGUROS ORINOCO and STEAMSHIP MUTUAL [2/] as alleged liability insurers for the vessel and for LINEA MANAURE, C.A. [3/] The case was consolidated with

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2/ The STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA), LIMITED had its origins in the traditional structure of groups of shipowners, which joined together starting in the 19th Century to provide for themselves a system of protection and indemnity assurance. These groups came to be known as "P and I clubs," and the shipowners were their "members." Broadly stated a member of the "club" is entitled to be reimbursed, or indemnified, by the other members of the club, for payments the member has been found legally liable to pay, and has paid, for, e.g., cargo loss or damage. 1 Arnould on Marine Insurance §§ 80-83 (13th ed. 1950).

3/ Underwriters have denied they were "liability" underwriters for the vessel and maintain they issued policies of "indemnity" assurance with the limited obligation of reimbursing (indemnifying) LINEA MANAURE, C.A. amounts it might pay to cargo claimants. The distinction between liability and indemnity coverage has not been ruled on by the federal courts and is not currently before this Court.

* * *

The Amended Complaint includes NUEVO MUNDO SEGUROS GENERALES, S.A. as a defendant. At the time of the carriage of the cargo, LINEA MANAURE, C.A. was insured in the first instance by either SEGUROS ORINOCO or NUEVO MUNDO, which re-insured the vessel risks with STEAMSHIP MUTUAL. SEGUROS ORINICO moved for dismissal/summary judgment based on the contention that it was not on the risk at relevant times, and the motion was granted. NATIONAL CORPORACION has not appealed from this basis for dismissal. Therefore, technically SEGUROS ORINOCO is no longer a party to this case. NUEVO MUNDO, it is believed, was never served with process.

seven similar cases pending in the Jacksonville Division in the United States District Court. The only distinction among the cases, relevant to the certified question raised in this appeal, is the fact that the instant case is based on events occurring after October 1, 1982, while the seven companion cases are based on events occurring before that date. As will be shown below, the significance of October 1, 1982, is that it is the effective date of the 1982 amendment to Florida Statute §627.7262, the new non-joinder statute.

On May 18, 1984, Underwriters moved for dismissal or for summary judgment on the following grounds:

1. Neither Florida law nor the General Maritime Law of the United States permit third-party claimants to sue marine underwriters directly or to join them in actions against their insureds; and

2. STEAMSHIP MUTUAL is merely a reinsurer, and no right of direct action or joinder has been recognized under any regime against reinsurers. The federal courts have not reached this "reinsurance" issue so that it is not currently before this Court. (App. 5)

The motion for dismissal/summary judgment was granted on October 5, 1984 on the following grounds:

1. The General Maritime Law of the United States does not permit direct actions against marine insurers or joinder of marine insurers in lawsuits against their insureds; and

2. The Florida law does not permit direct actions

against or joinder of marine insurers by virtue of the public policy pronouncement of the Florida Legislature by enacting § 627.7262, Florida Statute (1982 amendment). (App. 5)

An appeal was taken by NATIONAL CORPORACION in the instant case and by the plaintiffs in the seven companion cases -- all eight cases were consolidated on appeal. The Eleventh Circuit reversed the dismissal/summary judgment in the seven companion cases in accordance with its recent decision in Steelmet, Inc. v. Caribe Towing Corp., 747 F.2d 689 (11th Cir. 1984), modified on reh'g, 779 F.2d 1485 (11th Cir. 1986), upon the following grounds:

1. The General Maritime Law of the United States has no rule with respect to direct actions against or joinder of marine insurers so that the admiralty court may look to Florida law for an applicable rule; and

2. Since the seven cases accrued before October 1, 1982, before the effective date of the 1982 amendment to § 627.7262, the rule of Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969) applied, permitting the joinder of the underwriters.

The Eleventh Circuit treated this post-October 1, 1982 case differently and observed that while §627.7262 does not appear to apply to marine insurance by virtue of §627.021(2)(c), the language of Osborne v. Elizabeth Massey Investment Corp., 467 So.2d 1095, 1096 (Fla. 4th DCA 1985)

suggests that the Legislature's public policy pronouncement in the amendment to §627.7262 should control. And the Eleventh Circuit certified to this Court the following question:

> Does Florida law recognize a right of direct action against a marine liability insurer in a cargo damage action accruing after October 1, 1982?

National Corporacion Venezolana v. M/V MANAURE VI, 791 F.2d 137 (11th Cir. 1986), modified by order dated July 16, 1986 (App. 7).

SUMMARY OF THE ARGUMENT

This Court and the Florida Legislature could not have intended to preserve the joinder rule of Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969) in the context of marine liability insurance while proscribing joinder of casualty insurers -- the very class of insurers which were the original object of joinder. The certified question should be answered in the negative with this Court recognizing that public policy in Florida is against joinder of all liability underwriters. A contrary ruling would permit the strange result that a class of underwriters (marine insurers) never considered by this Court to be subject to joinder would now be the only class of underwriters subject to joinder. There is no overriding public policy justification for preserving the joinder rule in the marine insurance context.

ARGUMENT

THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

FLORIDA LAW DOES NOT RECOGNIZE A RIGHT OF DIRECT ACTION AGAINST A MARINE LIABILITY INSURER IN A CARGO DAMAGE ACTION ACCRUING AFTER OCTOBER 1, 1982.

Preface

NATIONAL CORPORACION would have this Court rule that although the joinder rule is no longer followed in automobile cases, it should be followed in marine insurance cases. Underwriters respectfully submit that logic should prevail, and this Court should answer the certified question in the negative and rule: the joinder rule is no longer to be followed in any case.

* * *

At the outset, it should be noted that the question as framed by the Eleventh Circuit must be answered in the negative if taken literally. There has never been a rule in Florida permitting "direct actions" against liability underwriters. The insured is an indispensible party. Therefore, at most, Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969) permitted "joinder" of liability underwriters in lawsuits against their insureds. Peoples v. Florida Insurance Guaranty Association, Inc., 313 So.2d 40, 41 (Fla. 2d DCA 1975); Kephart v. Pickens, 271 So.2d 163, 164-65 (Fla. 4th

DCA 1972), cert. denied, 276 So.2d 168 (Fla. 1973). 3/ Therefore, to permit resolution of this case, the question certified by the Eleventh Circuit should be read as inquiring whether the Florida law recognizes a right of joinder of a marine liability insurer in cases accruing after October 1, 1982, with this Court's opinion making this clear.

Background

This Court first considered a claimed right to join an insurer in a lawsuit brought by a third party against its

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3/ In Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485, 1491 (11th Cir. 1986), Chief Judge Godbold observed that "Shingleton" itself spoke exclusively in terms of a direct cause of action. Judge Godbold also observed that "[t]he distinction [between direct action and joinder] has no significance in our decision." Id. However, a panel of the former Fifth Circuit, on which Judge Godbold sat, observed that "Florida permits an injured party to join the insurance company as co-defendant with the insured... [n]o Florida case has ever held that an insurance company is subject to suit without joining the insured as a party for a complete resolution of the allegedly tortious conduct. In Florida the insurance company must be sued jointly with the insured to withstand a motion to dismiss." Freed v. State Farm Automobile Insurance Co., 491 F.2d 972 (5th Cir. 1974) Underwriters submit that Judge Godbold's pronouncement of Florida law in Freed, in which he relied on Kephart v. Pickens, is accurate. Hertz Corporation v. Piccolo, 453 So.2d 12 (Fla. 1984), does not stand for a contrary proposition. In Piccolo, this Court, faced with a conflict of laws question, held that the Louisiana direct action statute was applicable and permitted a direct action. In the instant case, there is no contention that Louisiana's direct action statute is applicable.

insured in Artille v. Davidson, 126 Fla. 219, 170 So. 707 (Fla. 1936), in the motor vehicle insurance context. This Court held that there was no right to join the underwriter. This Court next considered the question, again in the motor vehicle insurance context, in Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969), and recognized a right of third parties to join an insurer in a lawsuit against its insured. The Shingleton court said:

> It cannot be disputed that securance of liability insurance coverage protection for the operation of a motor vehicle, . . . is an act undertaken by the insured with the intent of providing a ready means of discharging his obligations that may accrue to a member or members of the public as a result of his negligent operation of a motor vehicle on the public streets and highways of this state.

Id. at 716.

This new joinder rule was extended from automobile liability insurers to other forms of liability insurance in Beta Eta House Corp., Inc. of Tallahassee v. Gregory, 237 So.2d 163 (Fla. 1970).

So far as research has disclosed, this case is this Court's first opportunity to consider whether the Shingleton joinder rule should be extended to apply to marine insurance. The only pre-1982 reported opinion of a Florida court permitting joinder of a marine insurer when opposed by the underwriter, is Quinones v. Coral Rock, Inc., 258 So.2d 485 (Fla. 3d DCA 1972), relying on Shingleton and Beta Eta House.

Next came Steelmet, Inc. v. Caribe Towing Corp., 747 F.2d 689 (11th Cir. 1984), in which it was held that the Shingleton joinder rule was applicable to marine insurance. On petition for rehearing in Steelmet, the court was careful to note that the case was based on events occurring before October 1, 1982, the effective date of the 1982 amendment to §627.7262, Florida's new non-joinder statute. Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485, 1489 (11th Cir. 1986).

The Eleventh Circuit recognized that the instant case is based on events occurring after October 1, 1982, resulting in the certified question to this Court.

Legislative Action

In response to the Shingleton joinder rule, the Florida Legislature enacted §627.7262, Fla. Stat. (1977), effective on October 1, 1976, and §768.045, Fla. Stat. (1977), effective on July 1, 1977. By enacting these two statutes, it is submitted that the Florida Legislature stated the public policy of the State of Florida to be against joinder, as early as October 1, 1976. However, since the joinder rule was a rule of procedure and not of substantive law, this Court declared §627.7262 (1977) and §768.045 (1977) unconstitutional as infringing on this Court's rule-making authority in Markert v. Johnston, 367 So.2d 1003 (Fla. 1978)

and Cozine v. Tullo, 394 So.2d 115 (Fla. 1981), respectively.

In 1982 the Florida Legislature again stated Florida public policy as against joinder by amending §627.7262 to proscribe joinder of casualty insurers until after judgment has been entered against the insured.

This Court Recognizes the Legislature's Public Policy Pronouncement Against Joinder

In VanBibber v. Hartford Accident & Indemnity Insurance Co., 439 So.2d 880 (Fla. 1983), this Court held that the amended statute is substantive and therefore constitutional. More importantly, this Court observed that "[i]t is readily apparent that, by enacting this statute, the legislature sought to modify the third-party beneficiary concept adopted by this Court in Shingleton v. Bussey. . . ." Id. at 882. And this Court went on to say:

> While this Court may determine public policy in the absence of a legislative pronouncement, such a policy decision must yield to a valid, contrary legislative pronouncement. In Shingleton we found that public policy authorized an action against an insurance company by a third-party beneficiary prior to judgment. The Legislature has now determined otherwise. Our public policy reason for allowing the simultaneous joinder of [a] liability carrier espoused in Shingleton, therefore, can no longer prevail.

Id. at 883.

The quoted language is in broad terms and, it is submitted, is a recognition that in cases accruing after October 1, 1982, Florida public policy is as it was in 1936 -- against joinder of liability insurers. See also, Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277, 279 (Fla. 1985).

The only Florida case reported since the 1982 amendment to §627.7262, in the marine insurance context, is Osborne v. Elizabeth Massey Investment Corp., 467 So.2d 1095 (Fla. 4th DCA, 1985), in which it was held that joinder of a marine insurer was appropriate, under Shingleton v. Bussey, in that case which accrued on July 7, 1979. However, the Osborne court observed that the amended version of §627.7262 "at the present time would prohibit the direct joinder of an insurer . . . ." Id. at 1096.

The problem, and the reason this case has found its way to this Court, is the fact that §627.021(2)(c), Fla. Stat. (1983) provides, in effect, that §627.7262 does not embrace marine insurance. So the question is more accurately whether the public policy pronouncements made by the Florida Legislature, both in 1976 and in 1982, are pronouncements that Florida public policy is against joinder of liability insurers in general and whether this public policy pronouncement should be recognized by this Court. Underwriters submit that the three attempts by the Florida Legislature to proscribe joinder, the original version of §627.7262, §768.045 (1977), and §627.7262 (1982 amendment),

demonstrate that public policy in the State of Florida is against joinder of any liability insurer, and that this Court recognized this shift in public policy in VanBibber, supra. This is the only logical conclusion to be drawn. Certainly the Florida Legislature did not intend to preserve the joinder rule in the context of marine insurance while proscribing joinder of motor vehicle insurers, the very class of insurers which were the original objects of joinder. The most probable explanations of the Legislature's omission to make the principle of §627.7262 applicable to marine insurers in so many words are either legislative oversight in failing to include marine insurers or an indication that the Florida Legislature felt that matters involving marine insurance should be left to the general maritime law. To interpret §627.021 as defining the classes of underwriters which remain subject to joinder would lead to strange results. In addition to marine insurance, §627.021 provides that Chapter 627 does not apply to reinsurance, aircraft liability insurance, and health insurance. Does this mean that the Shingleton joinder rule applies in the context of these types of insurance? Underwriters submit that this could not have been the intention of the Legislature. Joinder started when this Court observed the risks to motorists on the public streets of the State of Florida. There is no comparable public policy consideration in the instant case in which the

plaintiff is a Venezuelan corporation and the Underwriters are Venezuelan and Bermudan. Quite simply, there is no public policy overlay in the instant case, in this marine insurance context, to justify this Court's overriding the public policy pronouncements of the Florida Legislature. 4/

Procedural Rule Versus Substantive Right

In the United States District Court and in the Court of Appeals, NATIONAL CORPORACION has claimed that the joinder rule of Shingleton v. Bussey gives a sustantive right of joinder.

Research has led to no authority to support the contention that the Shingleton v. Bussey joinder rule established a substantive right. In Russell v. Orange County, 237 So.2d 192, 193 (Fla. 4th DCA 1970), the court said as follows:

> Shingleton v. Bussey . . ., relied on by the appellant did not affect a change in the substantive law of this state dealing with the liability of insurers. It merely innovated a procedure which permits the joinder of an insurance carrier in a suit against the insured.

This Court has never said expressly either that the joinder rule is a procedural rule or that it established a

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4/ It has been argued, with reason, that insureds and their insurers are prejudiced in lawsuits when the insurer is joined as a defendant. Somers, Killing the Golden Goose, Fla. B.J., February, 1986 at 10.

substantive right. However, by inference, this Court has ruled that the Shingleton v. Bussey joinder rule is a rule of procedure. In Hertz Corp. v. Piccolo, 453 So.2d 12 (Fla. 1984), in response to a conflict of law question, this Court held that the Louisiana direct action statute is substantive, saying, "The essential nature of the Lousiana statute, the factor which makes the statute substantive, is that suit may be maintained against the insurer alone." Id. at 15. As pointed out in the preface to this brief, no Florida case has ever recognized a third party's right to sue a liability insurer alone. Therefore, since the Shingleton v. Bussey joinder rule lacks the required factor that makes the Louisiana direct action statute substantive, the joinder rule must be procedural.

This should not be confused with this Court's ruling in VanBibber v. Hartford Accident & Indemnity Insurance Co., 439 So.2d 880 (Fla. 1983). In that case the Court did not rule that the Shingleton v. Bussey rule was substantive. This Court only ruled that §627.7262, Fla. Stat., as amended in 1982, creates a substantive right of post-judgment action against a liability insurer under the circumstances permitted by the statute. Moreover, in Markert v. Johnston, 367 So.2d 1003 (Fla. 1978) and Cozine v. Tullo, 394 So.2d 115 (Fla. 1981), this Court, in striking two earlier attempts of the Florida Legislature to ban joinder, held that joinder of an insurer was a procedural matter. The

bottom line is: the Shingleton v. Bussey joinder rule was a procedural innovation and did not establish a substantive right to proceed against a liability insurer that has committed no tort and breached no contract.

Issues Not Before the Court

By agreement between the parties, briefs are being submitted simultaneously. Therefore, Underwriters cannot be certain as to the issues and arguments that will be asserted on behalf of NATIONAL CORPORACION. However, in the briefs submitted to the Eleventh Circuit in this case and in the seven pre-October 1, 1982 cases consolidated with it, counsel for NATIONAL CORPORACION urged the Eleventh Circuit to recognize "direct action" and joinder upon the grounds that under general contract law principles, third-party beneficiaries to contracts have been variously permitted to bring action against one of the original contracting parties. No issue in this regard has been presented to this Court. In the instant case the Court's review is limited to the certified question, and Underwriters submit that any argument on issues other than the issue presented by the certified question to this Court should be disregarded.

SUMMARY

In Shingleton v. Bussey, this Court interpreted Florida public policy to be in favor of joinder of liability insurers. On three occasions the Florida Legislature attempted to restate public policy as against joinder. This Court should now look at the totality of the legislative action as a statement that Florida public policy is against joinder.

CONCLUSION

This Court should answer in the negative the question certified by the United States Court of Appeals for the Eleventh Circuit and should hold that Florida law does not recognize a right of direct action against a marine liability insurer in a cargo damage action accruing after October 1, 1982. Shingleton v. Bussey, Beta Eta House, and Quinones v. Coral Rock should be overruled.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished this 5th day of August, 1986, to JOHN B. CULP, JR., 3114 Independent Square, Jacksonville, FL 32202.

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